Filed 12/10/08 P. v. Meza CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MARIO ALONZO MEZA, Defendant and Appellant.	B202167 (Los Angeles County Super. Ct. No. NA072567)

APPEAL from a judgment of the Superior Court of Los Angeles County. Jesse I. Rodriguez, Judge. Affirmed.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr., and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent

* * * * * *

Mario Alonzo Meza appeals from the judgment entered following a jury trial resulting in his convictions of two counts of aggravated sexual assault of a child (Pen. Code, § 269, subd. (a)(1)),[1] two counts of forcible rape (§ 261, subd. (a)(2)), two counts of forcible oral copulation (§ 288a, subd. (c)(2)), forcible sodomy (§ 286, subd. (c)(2)), and continuous sexual abuse of a child (§ 288.5, subd. (a)). He was sentenced to an aggregate term in state prison of 72 years to life.

On appeal, he contends that: (1) his convictions were the product of improper witness intimidation; (2) there was prosecutorial misconduct; and (3) the evidence is insufficient to support the judgment.

We affirm the judgment.

FACTS

I. The Charges

In counts 1 and 2, the information charged appellant with aggravated sexual assault of a child (§ 269, subdivision (a)(1)), that was committed by raping the female child, T., who was under the age of 14 and ten years or more younger than the perpetrator, by means of force, threat, duress, or fear of immediate and unlawful bodily injury. The period during which such acts were alleged to have occurred was August 30, 2001, to August 29, 2003, when T. was 12 and 13 years old.

The following counts in the information were alleged to have occurred between August 30, 2003 and August 29, 2005, when T. was 14 and 15 years old. In counts 3 and 4, appellant was charged with forcible rape. (§ 261, subd. (a)(2).) In counts 5 and 6, he was charged with forcible oral copulation. (§ 288a, subd. (c)(2).)

In count 7, appellant was charged with forcible sodomy during the period between August 30, 2002, and August 29, 2005, when T. was 13, 14, and 15 years old. (§ 286, subd. (c)(2).)

In count 8, the information charged appellant with continuous sexual abuse of T. during the period from August 30, 1997 to August 29, 2001, a four-year period when T.

---

[1] All further statutory references are to the Penal Code unless otherwise indicated.

was eight, nine, ten, and 11 years old. (§ 288.5, subd. (a).) That count charged that appellant had committed three or more acts of "substantial sexual conduct" with T. over a period of more than three months and that he had committed three or more acts of lewd conduct (§ 288) with T. during this period, a child who was under 14 years of age. Also, at that time, he resided with her and had recurring access to her.

The jury found appellant guilty in counts 1 through 8.

II. The Trial Evidence

A. The Prosecution's Case-in-Chief

1. The Introductory Facts

T.'s mother testified that she married appellant when T. was three years old. Subsequently, the mother and appellant had a son, who at the time of trial was age 12. Appellant resided with T.'s mother until he was arrested. T. was age 16 at that time. T. was 17 at the time of trial. Appellant was 37 years old in 2001, when the charged sexual abuse commenced.

On September 29, 2005, about the time of T.'s 16th birthday, T. reported to the high school's nurse and then to police detectives that her stepfather had been sexually abusing her for at least the last ten years. T. recalled that at age eight, appellant began fondling her. Her earliest memory of fondling was that he massaged her genitalia over her clothing when they were driving in his BMW. At age 12, he began having sexual intercourse with her. After the sexual abuse came to light, T.'s mother was not supportive of T.'s complaint, and on the initial date set for a trial, the mother and T. failed to appear. The case had to be dismissed and refiled.

Later, when the prosecution secured T.'s attendance for the present trial, T. recanted. T. testified only to one incident of rape in June 2004 and that appellant had arranged a secret abortion for her when he had discovered that she was pregnant. At trial, T. denied any other sexual abuse and claimed that she did not recall what she had previously disclosed to others concerning the extensive sexual abuse.

T.'s boyfriend at the time, A., testified that T. had told him that she was reluctant to complain about the abuse because initially, she was concerned that no one would

believe her. Nevertheless, when it became apparent to her that appellant intended to persist in sexually abusing her after she was 16 years old, she decided to tell her mother and to report the abuse.

The high school assistant principal testified that in November 2006, T. spoke to him about her and her mother's reluctance to proceed with the complaint at trial. T. told the assistant principal that she believed that the punishment the law required to be meted out to appellant for the abuse was too severe. She wanted him to be punished only with a ten-year prison term, which approximated the period of time during which he had sexually abused her.

Before trial, T. had written a letter to the prosecutor telling him that she had forgiven her stepfather and wanted any charges involving force and violence dismissed. Later, she wrote another letter to the prosecutor claiming that she had lied about her complaints and that she wanted to have the charges dismissed. T.'s mother took her son and T. on vacation to San Diego when T. was subpoenaed to appear for the first trial. That case was dismissed.

When the case was again set for trial, T. testified that she had exaggerated her complaint because she was angry that her parents had taken her out of a Tae Kwon Do class, which meant that she would be unable to see her boyfriend, A. T. also testified that she exaggerated because she had believed that no one would believe her complaints of sexual abuse.

The trial evidence revealed that T. had made her out-of-court complaints of long-term sexual abuse to her boyfriend, A., her best friend, the high school nurse, the two detectives in the case, and to a clinical social worker prior to the sexual abuse examination.

2. T.'s Out-of-Court Complaints of Sexual Abuse

The preliminary hearing in appellant's case was held in January 2006. During that proceeding, T. testified that the fondling began when she was eight years old. However, she told the assistant principal at her high school that the fondling started when she was

between six and seven years old. She recalled that during the period when she was eight to ten years old, appellant had also fondled her breasts on about 10 to 15 occasions.

When she was ten years old and started the fifth grade, appellant asked her to come into the supply room at home. On that occasion, and later in the family computer room, he had her disrobe and get on her hands and knees on the floor with her back to him. He then took off his pants and masturbated using her unclothed anal and vaginal area, frequently ejaculating on her. She was unable to recount how many times he had engaged in sexual activity with her; she only recalled that it was at least five times. (Count 8.) He also frequently rubbed her breasts. Usually, he would molest her when her mother was at work.

When she was 12 years old and in the seventh grade, shortly after Christmas or in January 2001, he had sexual intercourse with her for the first time. She was able to remember the date of the sexual intercourse because appellant and her mother had had a fight and he had moved out on Christmas Day. Several days later, he moved back in. (Count 1.) When he had sexual intercourse with her, he rarely wore a condom. He continued to have sexual intercourse with her. During this period, he also sucked on her breasts. She recalled that when she was age 14, the sexual intercourse had occurred at least four times. When she was age 15, it occurred 15 to 20 times. (Counts 2 & 4.)

At age 14, in about June 2004, she became pregnant, and he arranged for her to get an abortion and paid for it. (Count 3.) She recalled that during one incident of rape, she tried to get away, struggled, and pushed him off, but she could not prevent him from raping her.

After T. reported the sexual abuse, a clinical social worker, Teresa Rubio, interviewed T. T. told Rubio that on the day in 2004 when appellant discovered that T. was pregnant, he had sexual intercourse with her from behind. At that time, her brother was taking a shower. Appellant had ejaculated inside her vagina. There was another occasion when he climbed on top of her while she was in bed and had sexual intercourse with her. When she turned her head so as to refuse to kiss him, he kissed her on the neck.

He told her to "Relax" and to "Let me in," meaning to permit him to enter her vagina with his penis.

The last incident of sexual intercourse occurred just before her 16th birthday.

At age 12, she recalled attempting to resist the sexual activity by pushing him away. She said that regardless of her resistance, he would "just continue." T. told Rubio about an incident that occurred in the ninth grade where she was about to fall asleep when appellant called to her. She told him that she was tired and said, "Leave me alone." When she refused to come out of her bedroom and into the computer room, appellant went outside and knocked on her window and told her to come outside. She did not comply. Later, he entered her bedroom and hit her on the mouth, cutting her lip. He demanded that she disrobe, and this time, she complied. He told her, "You need to start listening to me." He then let her dress, and she went to bed. He did not insist on having any sexual contact with her that night.

On three occasions, he had taken photographs of her. He used one photograph to etch an image of her in glass. He had her watch pornography with him and used the video to instruct her on how to engage in sexual activity.

When she was age 14, he had committed the first act of forcible oral copulation with her. When she was age 14, she recalled five occasions of forcible oral copulation. It happened about ten times when she was age 15. (Counts 5 & 6.) T. testified that on one occasion when she was 13 or 14 years old, appellant had also forcibly sodomized her. She bled, and it was painful. (Count 7.)

She told appellant several times that she did not like what he was doing and that she wanted to be left alone. She inquired why he did not molest his own daughter, who lived elsewhere. He said that that was different. He told her that if she complied with his wishes, the sexual abuse would stop. But it never did.

3. The Remaining Trial Testimony

T. acknowledged during her trial testimony that appellant had sexual intercourse with her in June 2004 when she was 14 years old, the occasion that led to the abortion.

Rubio testified that T. told her that T. had cooperated in the abuse because she was "used to it," appellant would not help her otherwise, and she did not want to get hurt. When Rubio asked why T. had not reported the abuse earlier, T. replied, indicating her mother, who was crying outside the interview room, "You see how she is, crying." T. explained that she did not want to upset her mother. She also told Rubio, "It was going on for so long. I thought I could wait three years until I got out of the house." Also, T. said that she wanted to keep her family together. T. was concerned that her mother would repeat to her stepfather what she had said and that complaining might interfere with her school performance and going to college. However, she eventually had complained, as when she was age 16, she believed that she was just "too old to be treated this way."

At the end of the interview with Rubio, T. said that if she had to do it over again, she would not have complained. Her complaint hurt her mother, and her mother obviously did not believe her as the mother continued to support her stepfather.

At trial, Rubio opined that victim recanting in sexual abuse cases was not uncommon. It often occurred when the child was dependent physically and emotionally on a parent and where the nonoffending parent failed to support the child's complaint. Also, in some cases, pressure is applied to the child to recant and the child does not want to disrupt the family or to have her siblings enter foster care.

The prosecution was able to secure the fetal tissue taken from T. during the abortion for testing. The testing revealed that the fetus's father was appellant.

On September 2, 2005, T. had told her mother about the sexual abuse. However, the mother did not terminate her living arrangement with appellant or report the abuse.

After T. reported the abuse to the police, the detectives took T. home. They obtained a letter from T.'s bedroom that T. had written to her mother, but did not deliver. In the letter, T. went into a few details about the abuse and reproached her mother for not believing her complaints and for failing to support her.

When the detectives were at the family home, the detectives confronted appellant with T.'s complaint. He got upset and denied the abuse. Appellant gave the detectives

several text messages or e-mails written by T. and her boyfriend, A. Appellant claimed that T. had paid for the abortion herself.

B. The Defense

Appellant declined to testify on his own behalf.

T.'s mother testified that when T. was age six to 16, she and appellant had jobs that kept them away from home from at least 8:30 a.m. to 5:00 p.m. She claimed that appellant's hours were actually longer than hers, implying that there was no opportunity for any sexual abuse to have occurred. The mother also claimed that she was unaware of the sexual abuse until after T. made her September 29, 2005, complaint to the school nurse and the detectives. She corroborated that when she and appellant discovered that T. had a boyfriend, she had prevented T. from seeing him and stopped her attendance at the Tae Kwon Do class.

DISCUSSION

I. Witness Intimidation

Appellant contends that the trial court and the prosecutor engaged in a pattern of "attempted witness intimidation" that left the jury with the impression that T. had perjured herself at trial, violating his Sixth and Fourteenth Amendment rights to due process and a fair trial.

More specifically, appellant complains that: (1) before T.'s direct examination, in front of the jury, the prosecutor asked for an admonition as to perjury; (2) the trial court and the prosecutor gave T. lengthy admonitions about telling the truth; (3) the prosecutor pressed T. about whether she had told the truth during her preliminary hearing testimony; (4) there were threats of a perjury prosecution if T. did not testify as she had at the preliminary hearing; (5) T. was taken into custody over lunch at the prosecutor's request to ensure that she would return to complete her testimony during the trial and to avoid external pressure from her mother; (6) T. and her mother were threatened with contempt if the mother did not make T. available for further trial appearances; (7) such actions improperly signaled to the jury that T. was lying at trial.

The contention lacks merit.

A. Background

After the opening statements, trial counsel complained that the prosecutor was crying or sniffling during his statement.[2] He said that such conduct was prejudicial to defendant and would bias the jury.

The prosecutor admitted that there was a moment when he may have sounded a bit emotional—he felt the feeling coming on him—but it was unintentional. Also, he said that he had tried to hide his feelings and believed that he had done so. He admitted sniffling.

The trial court said that it was unable to determine whether the prosecutor was displaying emotion concerning the case or had a cold. Accordingly, it declined to make an issue of the conduct. The trial court told trial counsel that if the court admonished the jury about the conduct, it would simply accentuate "what may in my view was something that was not associated with the case."

T. began her testimony, and it became apparent that she intended to recant many of her extrajudicial and preliminary hearing claims of abuse. The prosecutor said to the trial court in front of the jury, "With the court's permission, maybe outside the presence, we need an admonition regarding perjury before I can proceed." The court replied, "Yes."

The jury was excused.

Outside the presence of the jury, the trial court admonished T. regarding her obligation to tell the truth when she testified. The court also said that it was not directing her how to testify, but that it is a crime to commit perjury. The prosecutor admonished T. to "tell the truth no matter what that is, but it is a criminal offense should someone be found to have lied under oath." The prosecutor added that he was "saddened" that the witness had taken it upon herself to potentially commit a straight felony offense. He

---

[2] The background set out in this contention pertains also to the determination of contention II, concerning prosecutorial misconduct.

asked her to be certain that she "spen[t] a great deal of time on contemplating what is the right and the truthful thing to do."

The trial court told T. the following. "The court does not tell anyone how to testify . . . . The court can only inform people that they must tell the truth, no disrespect to you . . . . And, again, I'm not telling you how to testify, but it is very important to tell the truth. And this is not a threat, but if a person is found not to tell the truth irrespective of any penal consequences . . . . You're a smart person." "Besides the actual penal consequences, that is, in terms of possible incarceration, it would be considered a crime if somebody were to be convicted of perjury. That it would be considered a crime of moral turpitude. . . . . The most serious of all those offenses and actions and acts of moral turpitude—the number 1 is perjury. That is the most serious of everything in anybody's life, personal, legal or combination of both. . . . Do you understand everything that I have said?"

After the admonishments, defense counsel said that he wanted to "note one thing": the prosecutor had been explicit about the nature of the admonishment to the witness in front of the jury. He commented that the prosecutor's conduct "potentially taints the jury in regards to assuming that [T. was] perjuring herself already."

The trial court said, "Very well. Thank you."

T. continued with her testimony. When it became apparent that T. would not be acknowledging the truth of her out-of-court complaints of sexual abuse and the truth of her preliminary hearing testimony, the prosecutor rigorously questioned her about how she felt about telling the truth.

At the sidebar, defense counsel suggested that if the prosecutor intended to question T. about whether she had committed perjury at the preliminary hearing, the witness had a right to consult with counsel. The trial court interrupted the proceedings and appointed counsel for T., who then conferred with T.

The proceedings resumed out of the presence of the jury. T.'s counsel indicated to the trial court that he had discussed T.'s testimony with her. The court inquired whether the prosecutor would be questioning T. about committing perjury at the preliminary

hearing. The prosecutor replied that he did not intend to question her on that subject. He intended to impeach her with her prior inconsistent statements. T.'s counsel indicated that T. would exercise her Fifth Amendment rights and refuse to reply to questions concerning whether she had previously committed perjury.

Proceedings before the jury resumed. After T. testified in part and recanted a number of statements that she had made out-of-court or at the preliminary hearing, the trial court recessed for lunch. The prosecutor requested that T. be detained over lunch because T.'s mother had previously failed to appear with T. He argued that the mother had told him that she had no intention of cooperating in the proceedings. He stated that T.'s testimony was in conflict with her prior out-of-court statements and her preliminary hearing testimony and T. was potentially committing perjury.

The trial court agreed to detain T. over the lunch recess to insure that she would be present in the afternoon to complete her testimony. It said that T. had asked for a 15-minute recess at 11:45 a.m. The court said that the request seemed strange and suggested that T. and her mother planned to abscond during lunch. Also, the court believed that T.'s testimony about a lack of recollection was disingenuous. The court concluded that "outside influences" were possibly affecting T.'s testimony.

The trial court had the juvenile authorities assume custody of T. over the lunch recess. It commented that the jury would be unaware of her detention. The court ordered that T.'s appointed counsel be given access to her for a consultation during the lunch hour and that she would be given lunch.

After lunch, the trial court told T. that if she needed further consultation with her counsel during her testimony, she could request a short recess. T. completed her testimony. The court ordered T.'s mother to return the following day for further testimony, if necessary. The court explained to the mother that T. was subject to recall for further testimony. It admonished the mother that if she was contacted to return to court, she was required to do so with her daughter.

The prosecutor admonished T.'s mother that the failure to return to court amounted to contempt of court. He remarked that the mother in the past had challenged

him to put her in jail and had told him that she would do whatever was necessary to protect her daughter and her daughter's wishes.

After the prosecutor's remarks, the trial court declined to place the mother on call. It ordered her to return to court at 10:00 a.m. the following morning. However, it ordered that T. was on call subject to recall.

The following morning, T. appeared with her mother. The prosecutor indicated that he wanted to question her further and would be recalling her as a witness again that morning.

B. The Analysis

Appellant complains of (1) "attempted witness intimidation" and (2) that comments the prosecutor made in the jury's presence concerning admonishing T. concerning perjury "left . . . the indelible and improper impression" on the jury that T. was committing perjury during her trial testimony.

Specifically, he complains that (1) the prosecutor asked the trial court in front of the jury, "With the court's permission, maybe outside the jury, we need an admonition regarding perjury before I can proceed"; (2) the events during T.'s testimony disclose that she was "pressured" to testify "for the State," was threatened with a perjury prosecution, and the prosecutor attempted to improperly influence her testimony or to dissuade her from testifying; (3) the prosecutor used its request above for an admonition about perjury and parts of her direct examination to improperly signal to the jury that T. was lying and to emphasize that she was lying to the extent she faced criminal charges; (4) T. was detained for 90 minutes by the juvenile authorities over the lunch recess at the trial court's order so as to assure her continued presence at the trial; (5) during final argument, the prosecutor argued that the jury should trust that the members of the district attorney's office would do what was fair and right and that T. had committed perjury and lied in part during her trial testimony; and (6) the trial court improperly assisted the prosecutor in engaging in this improper conduct. Essentially, appellant is urging that the above conduct deprived him of due process and fair trial.

Appellant's contention is flawed. There is no constitutional protection against "attempted witness intimidation." Appellant apparently is relying on the authorities that are concerned with witness intimidation that deprives a defendant of his constitutional rights to compulsory process and due process. (See, e.g., *Webb. v Texas* (1972) 409 U.S. 95, 98; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 52; *In re Martin* (1987) 44 Cal.3d 1, 31–32; *People v. Schroeder* (1991) 227 Cal.App.3d 784, 788; *People v. Bryant* (1984) 157 Cal.App.3d 582, 592–594.)

At trial, a defendant has a fundamental right to compel the attendance of witnesses on his behalf. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 15; *In re Williams* (1994) 7 Cal.4th 572, 603, citing *People v. Mincey* (1992) 2 Cal.4th 408, 460 & *In re Martin, supra,* 44 Cal.3d at pp. 29–30.) There was no deprivation of constitutional rights here because T. was not a defense witness. Nor was she a witness who failed to give expected material and favorable testimony for the defense. (*In re Martin, supra*, 44 Cal.4th at p. 32.) Also, any misconduct failed to dissuade the witness. (*Brady v. Maryland* (1963) 373 U.S. 83, 87; see *In re Martin, supra*, at pp. 31–32; *People v. Bryant, supra*, 157 Cal.App.3d at p. 593 [a reversal is appropriate only where it appears the intimidation affected the outcome of the trial].)

What the record shows is that T. was always reluctant to complain about appellant's sexual abuse because she had no support from her mother and was concerned about how her complaint about appellant would affect her ability to go to college. However, she finally filed complaints because she could not put up with the abuse any longer and her parents were denying her the opportunity to have a normal teenage social life. Also, when T. discovered that appellant would be incarcerated for effectively the rest of his life, depriving her brother and mother of appellant's company, she thought the punishment was too harsh. She decided to limit that punishment by recanting her testimony concerning the abuse, with the exception of the one allegation of the rape that led to her pregnancy.

The prosecution and trial court did what they could to dissuade her from lying during the trial. However, none of their admonishments concerning how important it was

to tell the truth had the effect of dissuading her from recanting earlier extrajudicial and preliminary hearing claims she made about the extent of the abuse. We do not need to reach the issue of misconduct because the evidence overwhelmingly demonstrates that the conduct of the trial judge and the prosecutor had no effect on T.'s decision concerning the content of her testimony. She, or she and her mother, were determined to manipulate the proceedings to their own ends. And, T. did not waiver in her determination to exonerate appellant from the effect of most of her complaints despite admonitions from the trial court and prosecutor that she tell the truth. Any claim that T. might have exonerated appellant absent the admonitions to tell the truth is speculative. (See *People v. Panah* (2005) 35 Cal.4th 395, 461–462.)

Insofar as appellant claims the prosecutor's request for a perjury admonition constituted one part of a course of conduct designed to improperly persuade the jury that T. was lying, the jury was totally unaware the rest of the events that appellant claims were part of this course of prosecutorial conduct. T.'s credibility was a major issue at trial, and appellant was not denied a fair trial by the prosecutor's conduct, or by his final argument to the jury. The possibility that T. had committed perjury at trial was before the jury through properly-admissible impeachment evidence. The request for a perjury admonishment was merely cumulative of that properly-admissible evidence and was not prejudicial. The prosecutor's closing comments constituted appropriate comment on the trial evidence. (*People v. Lopez* (2008) 42 Cal.4th 960, 971.)

With respect to the trial court's decision to detain T. for 90 minutes at the lunch recess, appellant has presented no authority supporting his standing to complain about T.'s detention. Code of Civil Procedure section 1219 is specific in providing that a victim of a sexual assault is not subject to the trial court's contempt power if she refuses to testify. But that provision does not affect a trial court's power to use reasonable custody to secure a reluctant witness's attendance at trial.[3] There's is no evidence that

---

[3] In *People v. Cogswell* (2007) 156 Cal.App.4th 698, 711–714, the court held that the provisions in Code of Civil Procedure section 1219 did not affect the ability of a trial

T's brief and reasonable detention affected the content of her testimony. (*In re Martin, supra*, 44 Cal.3d at p. 31 [to obtain a reversal, a defendant must demonstrate a link between any misconduct and an inability to present witnesses or testimony on the defendant's behalf].)

The trial court did not engage in improper intimidation by commenting to T. on the consequences of failing to tell the truth at trial. As appellant concedes, a trial court is permitted to advise a witness to tell the truth. (See *People v. Schroeder, supra*, 227 Cal.App.3d at pp. 787–789.) The trial court appointed counsel to advise T. with respect to her testimony. The court did not tell T. that she would be prosecuted or penalized for perjury; it simply urged her to tell the truth and warned her that failing to tell the truth was a violation of the law and a serious matter. (*People v. Harbolt* (1988) 206 Cal.App.3d 140, 154–155.)

II. The Claim of Prosecutorial Misconduct

Appellant contends that the judgment should be reversed because there was prosecutorial misconduct. We disagree.

Appellant complains that the prosecutor: (1) cried during his opening statement; and (2) intimidated T., as is discussed in the previous contention.

"A prosecutor's misconduct violates the Fourteenth Amendment to the United States Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642–643.) Misconduct by a prosecutor that does not render a trial fundamentally unfair is error under state law if the prosecutor uses "deceptive or reprehensible methods" to attempt to persuade the court or the jury. (*People v. Morales* (2001) 25 Cal.4th 34, 44.)

"'Governmental interference violative of a defendant's compulsory-process right includes, of course, the intimidation of defense witnesses by the prosecution. [Citations.]

---

court to subject a person ignoring process to reasonable custody to assure his or her appearance in court. Review was granted in *Cogswell* on February 13, 2008 (case No. S158898) and the opinion was ordered nonpublished.

[¶] The forms that such prosecutorial misconduct may take are many and varied. They include, for example, statements to defense witnesses to the effect that they would be prosecuted for any crimes they reveal or commit in the course of their testimony. [Citations.]' [Citation.] Threatening a defense witness with a perjury prosecution also constitutes prosecutorial misconduct that violates a defendant's constitutional rights. [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 835.)

To demonstrate prosecutorial misconduct on grounds of depriving a defendant of favorable testimony, appellant must show effective witness intimidation as defined above. He must demonstrate that the prosecutor interfered with his right to present witnesses. And he must show that the "conduct that was 'entirely unnecessary to the proper performance of the prosecutor's duties and was of such a nature as to transform a defense witness willing to testify into one unwilling to testify.' [Citations.]" (*In re Williams, supra*, 7 Cal.4th at p. 603.)

A. Waiver

At the outset, appellant's complaints of prosecutorial misconduct on grounds of witness intimidation and improperly attempting to persuade the jury are forfeited. In order to preserve a claim of prosecutorial misconduct for the appeal, a defendant must timely object on grounds of the misconduct *and* seek an admonition, unless the admonition would not cure the harm. (*People v. Ochoa* (1998) 19 Cal.4th 353, 427.) Here, appellant failed to object and to seek an admonition. He has failed to demonstrate on appeal that an appropriate admonition would not have cured any harm. Consequently, his claims of improper prosecutorial intimidation and improper attempts to persuade the jury concerning T.'s credibility are not cognizable. (See *People v. Hill*, *supra*, 17 Cal.4th at pp. 820–821.)

B. Witness Intimidation and the Perjury Admonition

The prosecutor did unnecessarily refer to the nature of the requested perjury admonition once in the presence of the jury. But the request did not infect the trial with unfairness. (See *People v. Harrison* (2005) 35 Cal.4th 208, 242.) Nor did the comment amount to "deceptive or reprehensible methods" of attempting to persuade the court or

the jury. (*People v. Morales, supra,* 25 Cal.4th at p. 44.) Nor was there a course of conduct starting with the request for the perjury admonition by which the prosecutor unfairly impugned T.'s testimony. The jury was totally unaware of the subsequent events that took place out of their presence. No prejudice flowed from this request because the properly-admitted impeachment evidence demonstrated that T. might be lying during her trial testimony. Thus, the request was merely cumulative of other admissible impeachment evidence and was not prejudicial. Any comment during the prosecutor's closing remarks concerning the truthfulness of T.'s testimony was based on the trial evidence. (See *People v. Boyette* (2002) 29 Cal.4th 381, 433.)

C. Prosecutorial Misconduct During the Opening Statement

As to the crying incident during opening statements, when defense counsel complained about the claimed misconduct, the trial court indicated that the defense complaint amounted to nothing. The court observed that it could not tell whether the prosecutor was emotional or if he simply had a cold. The court indicated that it was refusing the admonition because such an admonition would only suggest to the jury that the prosecutor had strong feelings about the case.

We credit the trial court's observations about the incident and conclude that this one isolated incident of sniffling or a display of emotion is insufficient to amount to prosecutorial misconduct under either the state or federal standards.[4]

---

[4] In his reply brief, appellant cites the decision in *People v. Lopez, supra,* 42 Cal.4th 960. That decision states the proper standard of review for prosecutorial misconduct, but otherwise it is factually inapposite. Also, insofar as appellant includes in his reply brief new claims of (1) improper vouching for the good faith and integrity of his own office and (2) that he expressed his personal opinion concerning T.'s credibility, the issues are forfeited as they are only belatedly raised in the reply brief and were not raised at trial. Also, this court would decline to find that this one isolated remark amounted to misconduct under state and federal standards. The prosecutor's conduct in this case is distinguishable from the extensive prosecutorial misconduct outlined in the decision in *People v. Hill, supra,* 17 Cal.4th at page 835.

III. The Sufficiency of the Evidence

Citing the decision in *People v. Casillas* (1943) 60 Cal.App.2d 785, 794 (*Casillas*), appellant contends the evidence is insufficient to support his convictions, with the exception of the evidence supporting his conviction of forcible rape alleged in count 3. He argues that because of the victim's recanting, the evidence fails to support seven of his eight convictions. We disagree.

A. Standard of Review

To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1077.) "'Where, as here, the jury's findings rest to some degree upon circumstantial evidence, we must decide whether the circumstances reasonably justify those findings, "but our opinion that the circumstances also might reasonably be reconciled with a contrary finding" does not render the evidence insubstantial.' [Citation.]" (*People v. Wallace, supra*, at p. 1077.)

The uncorroborated testimony of a single witness is sufficient to sustain a conviction, unless the testimony is physically impossible or inherently improbable. (*People v. Panah*, *supra*, 35 Cal.4th at p. 489.) "Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] [On review, this court resolves] neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 403.)

B. The Analysis

T., who was 17 years old at trial, testified that her stepfather, someone she loved, sexually abused her from an early age. When she became pregnant at age 14, he arranged for a secret abortion. Prior to trial, she had made numerous consistent complaints to two friends, a nurse, a social worker, and police detectives about appellant having sexually

molested her since she was eight years old. She testified at the preliminary hearing to the many years of sexual abuse, which included forcible sexual intercourse and other substantial sexual misconduct.

The prosecution corroborated T.'s complaints in part by testing of the fetal tissue that the clinic had retained after her abortion. DNA testing disclosed that appellant was the father of the fetus.

The evidence at trial demonstrated that despite T.'s complaints, her mother was unsupportive. T. was conflicted from the beginning about the disclosures as she was concerned about the need for appellant's financial support to continue on to college and her mother's and brother's needs for emotional and financial support from appellant. T. had expressed her disagreement to the prosecutor and to her high school assistant principal concerning the severity of the punishment appellant would receive if she testified truthfully. Apparently, with her mother's support, she had resolved to minimize appellant's punishment by taking it upon herself to recant at trial and to admit only the one act of rape that resulted in a pregnancy.

After examining the entire record, we are satisfied that the evidence, including T.'s trial testimony, preliminary hearing testimony, and out-of-court complaints, was reasonable, credible, and of solid value. The decision as to credibility was for the jury. The trial evidence is sufficient to support the judgment.

Relying on *Casillas, supra*, 60 Cal.App.2d at page 794, appellant argues that as T. recanted earlier claims at trial, the evidence is insufficient to support seven of the eight convictions. However, the instant case is distinguishable from *Casillas*. Appellant's identity as T.'s assailant was corroborated by the fetal tissue from the abortion. T. made consistent and credible complaints to any number of persons before her motive to lie at the trial arose. Except for recanting at trial apparently with a motive to protect her family, T. was a person of unassailable integrity and intelligence. As we stated above, on review, T.'s out-of-court and preliminary hearing complaints were credible and her efforts at trial to protect appellant were transparent. Such facts distinguish this case from *Casillas*, where the reviewing court found the victim's trial testimony and extrajudicial

complaints of sexual abuse to be improbable and false. (See *People v. Maxwell* (1979) 94 Cal.App.3d 562, 577; *People v. Bodkin* (1961) 196 Cal.App.2d 412, 416.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ